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IN THE

Supreme Court of the United States

October Term, 1977

No. 77-655

JAMES WALTER CROUCH,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Stanley E. Sacks, Esquire
SACKS AND SACKS
First & Merchants Bank Building
Norfolk, Virginia 23510
Counsel for Petitioner

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PETITION FOR A WRIT OF CERTIORARI TO
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FOR THE FOURTH CIRCUIT

Petitioner, James Walter Crouch, prays that a writ of certiorari issue to review the final judgment of the United States Court of Appeals for the Fourth Circuit rendered in this proceeding on July 28, 1977.

OPINION BELOW

The decision of the United States Court of Appeals for the Fourth Circuit affirming a judgment of conviction entered upon a jury verdict in the United States District Court for the Eastern District of

Virginia, at Norfolk, is embodied in a per curiam opinion which has not been reported. The opinion appears in the Appendix, infra.

JURISDICTION

The decision of the United States Court of Appeals for the Fourth Circuit was entered on July 28, 1977. The jurisdiction of this Court is envoked under Title 28 U.S.C. §1254(1). The time for filing the Petition expired on August 27, 1977, however, petitioner prays that he be granted an extension of time within which to file his Petition for a Writ of Certiorari, and that this Petition be deemed timely filed.

QUESTIONS PRESENTED

1. Whether the Trial Court and the Court of Appeals erred in departing from the established precedence of other jurisdictions in admitting into evidence the extrajudicial statements of alleged co-conspirators prior to the establishment of a prima facie case of conspiracy by other independent evidence?

2. Whether the Trial Court and the Court of Appeals erred in departing from the established precedence of other jurisdictions in allowing the jury to consider and rely upon the extrajudicial statements of alleged co-conspirators in their determination of the existence of a conspiracy where there was no independent evidence of the conspiracy?

3. Whether the Trial Court and the Court of Appeals erred in departing from the established precedence of other jurisdictions in admitting into evidence a

tape recorded telephone conversation of January 30, 1976, between a co-defendant, Gary Lennis Roberts, and a special agent of the Drug Enforcement Administration?

4. Whether the Trial Court erred in overruling defendants' motion for judgment of acquittal where there was no evidence presented which established an agreement or conspiracy among Crouch and the other defendants to manufacture methamphethamine?

5. Whether the Trial Court erred in admitting into evidence testimony as to the ingredients and method of manufacturing the chemical compound, PCP, where the same was immaterial, irrelevant and prejudicial to the defendant?

STATUTES INVOLVED

Title 21 U.S.C. §841:

§841. Prohibited acts A-Unlawful acts

(a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentially-

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

. . .

Title 21 U.S.C. §846:

§846. Attempt and conspiracy

Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt of conspiracy.

STATEMENT OF THE CASE

On June 14, 1976, an indictment was returned in the United States District Court for the Eastern District of Virginia, Newport News Division, charging the petitioner, James Walter Crouch, and two other individuals, Gary Lennis Roberts and Dorothy Perry Kazakavich, with conspiracy to manufacture methamphethamine, a Schedule II controlled substance, in violation of 21 U.S.C. §846. Each defendant entered a plea of not guilty to the indictment and requested trial by jury.

The charges against the petitioner, Crouch, were tried together with those against the other defendants before a jury on August 19 and 20, 1976. At the conclusion of all of the evidence the jury returned a verdict of guilty as to each defendant on Count One of the indictment, charging a conspiracy to manufacture methamphethamine.

Subsequent to the jury's verdict of guilty as to Count One of the indictment, counsel for the defendants made a Motion to set aside the jury's verdict and enter a judgment of acquittal as to Crouch and the other defendants. Thereafter, written Memoranda was submitted by counsel, and the matter was argued before the United States District Judge on November 19, 1976.

By Order dictated in open court on December 10, 1976, the District Court Judge overruled defendants' motions for judgment of acquittal, and entered a Final Judgment and Probation/Commitment Order as to each defendant. James Walter Crouch was committed to the custody of the Attorney General for imprisonment for a

period of five years and placed on special parole for a period of three years following his release from serving the said five-year sentence.

The evidence presented at trial revealed that sometime during November or December, 1975, federal and Virginia state drug enforcement agents became interested in, and directed an investigation toward, the activities of James Walter Crouch, Gary Lennis Roberts and Dorothy Perry Kazakavich. During the course of this investigation, which concluded in the arrest of Crouch and the other defendants on January 31, 1976, some ten to fifteen agents were involved.

The evidence further established that in the latter part of November, 1975, a man identifying himself as "Paul Banks", made several calls to General Scientific, a division of General Chemical Corporation, a laboratory supply house in Newport News, Virginia, and placed various orders. On December 2, 1975 the defendant, Crouch, went to General Scientific and picked up certain glassware, flasks and a condencer for an individual named Paul Banks. On this visit Crouch saw an old friend, Helen Belcher, who was an employee of General Scientific. She and Crouch renewed acquaintances and talked about getting together at a later time. Thereafter, a few days later, Crouch called General Scientific and introduced himself as "Paul Banks", stating that he wanted to check on an order. (Tr. 37) Ms. Belcher answered the phone on this particular call, recognized the voice as being that of Jimmy Crouch and inquired as to whether the caller was Jimmy. Crouch replied yes, and the two engaged

in a conversation for two or three minutes. (Tr. 37) During that conversation Ms. Belcher asked, "Jimmy are you doing anything wrong" to which Crouch replied no, that he was not doing anything wrong. While Ms. Belcher testified that she had talked to the man identifying himself as "Paul Banks" on several other occasions, she could not identify the voice on those occasions as being that of Crouch. (Tr. 39)

Other evidence established that during the latter part of October and November, 1975, a man identifying himself as "Paul Banks" placed several orders with Modern Machine and Tool Company, Inc., a supplier of labortory glassware in Newport News, Virginia. These orders were picked up at various times by different individuals. Mr. Work, an employee of Modern Machine and Tool Company, Inc., identified Crouch and the co-defendant, Roberts, as two of the individuals who has picked up laboratory glassware on behalf of "Paul Banks". (Tr. 253)

Telephone company billing and toll records establish that in October, 1975 numerous phone calls were made from Area Code 804-898-4409, which was identified as being the phone number of the co-defendant, Roberts, to various chemical houses in Richmond and Norfolk, Virginia. In addition, numerous phone calls were made from Roberts' phone to Wilmington, Delaware, Area Code 302-764-1214 and Zebulon, North Carolina, Area Code 919-269-9218, during the period of October, 1975 to January, 1976. Other phone records reveal that numerous calls were made between October, 1975 and January, 1976 from the Wilmington, Delaware phone, which was

identified as being that of David L. Wilkinson, to Roberts' phone in York County, Virginia.

Thereafter, on January 26, 1976, Kazakavich driving a white-over-blue Cadillac with Florida license plates, and accompanied by another female, went to General Medical of Tidewater, a chemical supply house in Newport News, Virginia, and purchased twenty (20) gallons of ether in the name of Sharon Townhouse Apartments, the apartment complex where Ms. Kazakavich was the resident manager. After the ether was loaded into the trunk of the Cadillac, Kazakavich drove to her apartment, Apartment Number 1, at 13401 Sharon Drive, York County, Virginia, where the women got out and went into Apartment Number 1. Nothing was removed from the car at that time. (Tr. 61)

On January 27, 1976, shortly before 12 o'clock noon, three men identified as Glen Queen, Mark Donner and Steve Spriggs, backed the Cadillac up to the entrance to Apartment Number 7, located at 13401 Sharon Drive, opened the trunk and began removing boxes from the trunk placing the boxes in Apartment 7.(Tr. 61-62) While there was some movement back and forth between Apartment 1 and Apartment 7, drug enforcement agents who had the location under constant surveillance did not see any boxes transported from Apartment 7 to Apartment 1. (Tr. 61-62) Later that same day, Spriggs and Donner loaded what appeared to be the same boxes back into the trunk of the Cadillac. Neither of the defendants, Crouch, Roberts or Kazakavich, were present or assisted in the unloading or loading of the boxes at either of these times. (Tr. 95, 99)

On January 28, 1976, Gary Roberts driving a 1971 aqua-colored Toyota, and accompanied by James Crouch, went to General Medical of Tidewater and picked up five (5) kilograms of the chemical methylamine. The boxes containing the methylamine were loaded into the rear seat of the Toyota. After leaving General Medical of Tidewater, Roberts and Crouch, who were under surveillance, eventually drove the vehicle to 13401 Sharon Drive, and parked the Toyota beside the Cadillac. (Tr. 99) Both men got out of the Toyota and Crouch opened the trunk of the Cadillac. Roberts got what appeared to be a manila folder with sheets of paper in it out of the front portion of the Toyota and appeared to check off items from a sheet of paper as he looked into the trunk of the Cadillac. They then shut the trunk and went into Apartment 1 at 13401 Sharon Drive, leaving the boxes in the Cadillac and the methylamine in the Toyota. (Tr. 86-87)

It was established at the trial that ether and methylamine are "common chemicals", which could be sold across the counter by any chemical supply house without a prescription. There was nothing improper or illegal in the purchase of either of these chemicals or in the purchase of any of the items of laboratory glassware purchased by Crouch or the other co-defendants.

From time to time during the week of January 26, 1976, and prior to their arrest on January 31, 1976, various persons including Crouch, Queen and Kazakavich were seen driving the Cadillac. Crouch, Kazakavich, Roberts, Queen and Spriggs, however, were never seen together at the same time. (Tr. 78) During this time the

defendants continued to be under surveillance.

Late in the evening of January 30, 1976, special agent Scott of the Drug Enforcement Administration called Roberts' phone number, spoke with an individual who identified himself as Gary, and recorded the conversation which he had with that individual. This recorded conversation was introduced into evidence at the trial over defense counsel's objection. Scott who did not identify himself as a drug agent, inquired as to the possibility of getting some "crank", slang terminology for methamphetamine. Scott did not ask Gary whether he was attempting to manufacture methamphetamine, he merely asked whether he could get something somewhere. Gary's reply was that it was a possibility. (Tr. 125) Gary indicated that it would be at least three days before he knew whether he could get some, or that it might be a month, and that he didn't know whether he could get anything at all. (Tr. 126) Scott testified that when he asked about getting some "crank" Gary told him "If you've got something up there to buy, buy it, you know cause I really don't know of anything for sure. . . ." (Tr. 126)

The next morning, on January 21, 1975 at 5:50 o'clock a.m., federal and state drug agents executed a search warrant at Kazakavich's apartment, Apartment 1, 13401 Sharon Drive, York County, Virginia, and arrested her. During the course of a thorough search of the premises, the agents found an invoice from General Medical of Tidewater for 20 gallons of ether which had been purchased in the name of Sharon Townhouse Apartments, an order-type form for two 55 gallon drums or barrels of ether from Suffolk Chemical for delivery

to Sharon Townhouse Apartments, and an Ohaus precision-type scale. (Tr. 150-152) When questioned at that time Kazakavich admitted ordering the ether from General Medical of Tidewater and stated that it was for use in farm equipment and farm machinery. (Tr. 156) The order for the two 55 gallon dums of ether had been cancelled and was not delivered. (Tr. 160) No chemicals, ether, drugs or laboratory glassware of any type was found in Kazakavich's apartment. (Tr. 160-162)

On that same morning a search warrant was executed at Gary Roberts' trailer, located at 2725 Route 17, York County, Virginia. During the search of that trailer, agents discovered and seized a respirator-type mask and various papers containing chemical notations. (Tr. 176-177) Roberts was placed under arrest at that time and his vehicle, the Toyota, was searched and seized. The search of the vehicle revealed a second respirator-type mask and under the front seat of the vehicle was found a brown paper bag with certain writing on it, indicating the name of a chemical warehouse and a chemical which was not available. (Tr. 191-193) The handwriting on the brown paper bag could not be identified. (Tr. 194)

A search was also made of the house located 1818 Route 17, York County, Virginia, where agents discovered an Ohaus 10:10 Scale and a handbook dealing with the cultivation of marijuana. (Tr. 177-179) While the searches of the trailer, house and Toyota were made by experienced officers and were described as thorough, no chemicals, ether or laboratory glassware of any type were found. (Tr. 181-182)

On that same morning the Cadillac was traced by electronic signal to a farm in Middlesex, North Carolina. North Carolina police officers arrested Crouch at the farm and conducted a thorough search of the automobile and the farm. Again no chemicals, ether or laboratory glassware of any description was found.

At the defendants' trial, held on August 19 and 20, 1976, David L. Wilkinson, a government informant from Wilmington, Delaware, testified, over the objection of defense counsel, as to numerous telephone conversations he had with Roberts between October, 1975 and the end of January, 1976. He stated that during these conversations, he and Roberts discussed the "origination of a methamphetamine factory" and that Roberts asked him to obtain three chemicals for him from the G. T. Baker Company, a pharmaceutical company in Phillipsburg, New Jersey. Wilkinson further testified that he and Roberts had discussed arrangements for Wilkinson to get some of the finished product and had even discussed a selling price of $500.00 per ounce. Wilkinson went on to state that on January 16, 1976 Roberts had told him that he [Roberts] was setting up a laboratory and had all of his glassware, but needed a few more chemicals.

On cross-examination Wilkinson admitted that he had previously been convicted of several felony charges of sales of marijuana, LSD, Methamphetamines and possession of heroin (Tr. 236-237); that subsequent to these convictions, and while he was on parole, he had been arrested in October, 1975, in Delaware on new drug charges (Tr. 238-239); that he had made a

deal to assist drug enforcement agents and to testify against Roberts in exchange for dropping the new drug charges against him (Tr. 240-241); that he received what he termed an allowance for "relocation expenses" of $450.00 for testifying at the defendant's preliminary hearing (Tr. 241); and that he had been promised additional allowances for "relocation expenses" in exchange for his testifying at the trial of the instant case. (Tr. 242-243) Wilkinson further admitted that when he had communicated with Roberts by telephone during January, 1976, he was doing so to save his own neck. (Tr. 246) Wilkinson also admitted that he never got any chemicals for Roberts (Tr. 246), and that during his telephone conversations with Roberts no mention was ever made of Crouch or Kazakavich, and that he did not even know them. (Tr. 2460247)

Other testimony presented at the trial by two chemists differed as to how methamphetamine is synthesized. Both chemists agreed, however, that methylamine and ether, the only two chemicals shown to have been purchased by any of the defendants, have numerous legal uses and that methamphetamine could not possibly be produced from these chemicals alone. The chemicals purchased by the various defendants were described as "common chemicals"; "household chemicals" and "chemicals you could find in any laboratory having a stock of chemicals."

The respirator masks, which were seized in the various searches, were identified by a foreman of Hampton Hardwood Corporation, Roberts' employer, as the type used by the employees to keep sawdust out of their noses and mouths. (Tr. 307-308) He further stated that these masks were supplied to the employees and that it was not unusual for the employees to leave the masks lying

around the job or take them home with them. (Tr. 310)

Based on the above the jury found the petitioner, James Walter Crouch, and the co-defendants, Roberts and Kazakavich, guilty of conspiracy to manufacture methamphetamine.

ARGUMENT

REASONS FOR GRANTING THE WRIT

1. The Trial Court and the Court of Appeals erred in departing from the established precedence of other jurisdictions in admitting into evidence the extrajudicial statements of alleged co-conspirators prior to the establishment of a prima facie case of conspiracy and further erred in allowing the jury to consider and rely upon these extrajudicial statements in the determination of whether a conspiracy did, in fact, exist to manufacture methamphetamine.

For purposes of argument, Questions 1, 2 and 3 presented for review in this Petition for Writ of Certiorari are closely related and will, therefore, be treated in one argument.

It is respectfully submitted that the Trial Court and the Circuit Court of Appeals departed from the established precedence of other jurisdictions and erred in allowing the admission into evidence of certain extrajudicial statements of the alleged co-conspirators prior to the establishment of a prima facie case of conspiracy by other independent evidence. It is further submitted that the Trial Court erred in allowing the jury to consider and rely upon these

extrajudicial statements in their threshold determination of the existence of a conspiracy.

The law appears to be well settled that in order for the extrajudicial statements of one alleged conspirator to be admitted into evidence against other alleged co-conspirators, as an exception to the hearsay rule, the existence of the conspiracy must first be proved by independent evidence. Glasser v. United States (1942), 315 U.S. 60, 86 L. Ed. 680, 62 S. Ct. 457 reh. den., 351 U.S. 827, 86 L. Ed. 1222, 62 S. Ct. 629. In determining the extent to which the conspiracy must be established prior to rendering the extrajudicial statements of an alleged co-conspirator admissible, the courts have generally held that the independent evidence must establish a prima facie case of conspiracy. United States v. U. S. Gypsum Co. (1948) 333 U.S. 364, 92 L. Ed. 746, 68 S. Ct. 525, reh. den., 333 U.S. 869, 92 L. Ed. 1147, 68 S. Ct. 788. Sendejas v. United States (1970, C.A. 9 Cal.) 428 F.2d 1040, cert. den., 400 U.S. 879, 27 L. Ed. 2d 116, 91 S. Ct. 122.

In the case of United States v. Spanos (1972, 9th Cir.), 462 F.2d 1012, 1014, the Ninth Circuit, in finding that the independent evidence offered was insufficient to establish a prima facie case of conspiracy and that therefore the extrajudicial statements of alleged co-conspirators were

inadmissible as evidence to establish the charge of conspiracy against the defendant, stated:

> "The Supreme Court has held that before the extrajudicial statements of a co-conspirator can be considered as evidence against a defendant, the government must establish by evidence, restricted to proof aliunde, that the conspiracy existed. Glasser v. United States, 1942, 315 U.S. 60, 74-75, 62 S. Ct. 457, 86 L. Ed. 680. The test, under our interpretation of the rule in Carbo v. United States, 9 Cir., 1963, 314 F.2d 718, is whether the independent evidence makes a prima facie case, 'one which would support a finding.' Id. at 737. This means substantial independent evidence of the conspiracy charged."

In United States v. Oliva (1974 5 Cir.) 497 F.2d 130, the Fifth Circuit discussed the standard to be used in determining the sufficiency of the independent evidence of a conspiracy and of the defendant's participation therein before the Judge may allow declarations of a co-conspirator to go before the jury. In Oliva, supra, at 133-134, the Court stated:

> "We define the test as whether the government by evidence independent of the hearsay declarations of a co-conspirator, has

established a prima facie case of the existence of a conspiracy and of the defendant's participation therein, that is whether the other evidence aliunde the hearsay would be sufficient to support a finding by the jury that the defendant was himself a conspirator. This test has been expressly adopted by the First, Eighth, and Ninth Circuits. United States v. Johnson, 1 Cir. 1972, 467 F.2d 804, cert. denied, 1973, 410 U.S. 909, 93 S. Ct. 963, 35 L. Ed. 2d 270 (evidence 'credible and sufficient to support the finding of concerted action'); Carbo v. United States, 9 Cir. 1963, 314 F.2d 718, 737, cert. denied sub nom. Palermo v. United States, 1964, 377 U.S. 953, 84 S. Ct. 1625, 12 L. Ed. 498 ('[T]he test is...whether, accepting the independent evidence as credible, the judge is satisfied that a prima facie case (one which would support a finding) has been made'); Rizzo v. United States, 8 Cir. 1962, 304 F.2d 810, 826 ('sufficient prima facie showing... aliunde of the declaration of an alleged co-conspirator')" (Footnotes omitted)

In the instant case, the Trial Court, over objections of counsel for the defendants, allowed numerous extra-judicial statements of one or more of the alleged co-conspirators into evidence prior to the establishment of

a prima facie case of conspiracy.

The Court allowed the jury to hear testimony from the witness, Ms. Belcher, as to a conversation she had had with Crouch, when he (Crouch) called General Scientific identifying himself as "Paul Banks" and inquired as to whether or not an order of chemicals had been received. (Tr. 35-37) The Court also allowed introduction into evidence of the taped telephone conversation of Agent Scott and the defendant Roberts, wherein Scott, without revealing his identity, inquired into the possibility of obtaining some methamphetamine. (Tr. 117) The Court further admitted into evidence testimony of Special Agent Clark of the Drug Enforcement Administration regarding a conversation he had overheard between Crouch and Roberts at a restaurant in Newport News, Virginia, wherein Roberts stated "if we could get the converter, it would be ideal." (Tr. 190, 191) The Court also allowed into evidence testimony as to conversations between the government's informant, Wilkinson, and Roberts involving the origination of a methamphetamine factory; the obtaining of chemicals by Wilkinson; and the selling price of methamphetamine. (Tr. 226-230)

With the exception of the one conversation between Crouch and Roberts overheard in the restaurant by Agent Clark, all of the other extrajudicial statements were made by one of the alleged co-conspirators outside of the

presence of the other two alleged co-conspirators. Clearly, these extra-judicial statements would not be admissible against the other alleged co-conspirators under the tests laid down in the authorities previously cited herein. Accordingly, these statements should not have been allowed to go to the jury prior to the establishment of the conspiracy by other independent evidence.

While it is true that upon admitting into evidence each of these extrajudicial statements of one of the alleged co-conspirators, the court advised the jury that they should determine whether a conspiracy existed before they considered those statements against the other alleged co-conspirators, it is submitted that such a procedure does not, and cannot possibly, adequately safeguard the rights of the alleged co-conspirators who were not present at the time the statements were made. Clearly, these alleged co-conspirators, by the admission of these extrajudicial hearsay statements, are denied their fundamental right to cross-examine the witness testifying against them and are prejudiced by the admission of these statements where they are being tried jointly, and the court has denied a motion for severance.

Excluding the extrajudicial statements of the alleged co-conspirators, the only independent evidence presented to sustain the burden of proving a conspiracy would be that at different times

the defendants purchased various laboratory glassware, twenty gallons of ether and five kilograms of chemical methylamine; that Crouch on one occasion used the name Paul Banks; that the defendants from time to time picked up various articles of laboratory glassware and the chemical methylamine for Paul Banks; that the defendants generally associated together and were seen in each other's company; that at the time of their arrest certain papers containing chemical notations were found in a trailer or automobile along with two respirator masks which were identified as the type used by Roberts in his employment; that the defendants from time to time called other chemical warehouses. Certainly this evidence taken alone is not sufficient independent evidence to establish a prima facie charge of conspiracy which would allow the extrajudicial statements to be admissible in evidence.

Thus, the Trial Court clearly erred in departing from the established rulings of the Courts of Appeal for the First, Fifth, Eighth and Ninth Circuits, as well as this Honorable Court, in allowing into evidence the extrajudicial statements of alleged co-conspirators prior to the establishment of the prima facie case of conspiracy. Notwithstanding any admonition given by the Trial Court, the jury certainly must have considered and relied upon these extrajudicial statements in determining the guilt of the petitioner of the charge of conspiracy to manufacture

methamphetamine. Without these statements it is submitted that there was no evidence presented at the trial upon which the jury could find Crouch guilty of conspiracy.

2. The Trial Court erred in overruling defendants' motion for judgment of acquittal where there was no evidence presented which established an agreement or conspiracy among Crouch and the other defendants to manufacture methamphethamine.

It is respectfully submitted that the evidence presented in the instant case, taken in the light most favorable to the United States does not establish an agreement or conspiracy among Crouch and the co-defendants to manufacture methamphetamine.

Conspiracy has been defined as an agreement or confederation of conspirators to commit one or more unlawful acts, where one or more of such parties do any act to effect the subject of the conspiracy. Kitt v. U.S., 132 F.2d 920 (4th Cir. 1943). Conspiracy exists whenever there is a combination, agreement, or understanding between two or more persons for the commission of an unlawful act. De Bonaventura v. U.S., 15 F.2d 494 (4th Cir. 1926). Thus the necessary elements of a conspiracy are [1] an agreement; [2] between two or more persons; [3] to accomplish some illegal purpose; [4] accompanied by some overt act in furtherance of the purpose of the agreement.

It has been said that the basis of a conspiracy is the unity of design and pur-

pose; it is what has been agreed to do and not what has been done. Also it has been held that several persons may, simultaneously, actually do, without incurring liability to punishment, that which, if it were the object of preconcerted design, could render the participants liable to indictment or conspiracy; nor will evidence that each of several defendants act illegally or maliciously with the same end in view support a charge of conspiracy unless it appears that such acts were done pursuant to a mutual agreement. Asgill v. U.S., 60 F.2d 780 (4th Cir. 1932). Proof of the agreement between the alleged co-conspirators is necessary to sustain a conviction. There must be more than mutual involvement in a transaction; there must be sufficient guilty knowledge to prove an agreement between the alleged co-conspirators to accomplish some illegal purpose.

It is true that the agreement need not be proven by direct evidence, but may be proven by circumstantial evidence. Glasser v. U.S., 315 U.S. 60 (1942).

In the instant case it is clear that the evidence presented by the United States is insufficient to sustain the governments burden of establishing a combination or agreement among the defendants to manufacture the drug methamphetamine.

It is true that Crouch and each of the co-defendants at one time or another purchased chemicals or laboratory equipment from chemical supply houses. All of these chemicals, however, were available to the public; and their purchase was lawful. They all had accepted common uses other than the manufacturing of prohibited drugs. Each of the chemicals purchased

was available without the necessity of a prescription and, in fact, the chemicals which were purchased by the defendants were insufficient to manufacture the drug methamphetamine. Both the chemist Lawrence who testified on behalf of the Government and the chemist Oglesby who testified on behalf of the defendants were in agreement that methamphetamine could not be produced from the chemicals purchased by the defendants. Oglesby testified the chemicals purchased by the defendants were "common chemicals" that "most of them or that type of basic chemicals you could find in any laboratory having a stock of chemicals. Many of them are household chemicals."

As stated in Argument #1, the association of Crouch with the co-defendants and their similarity of conduct taken in conjunction with the purchase of the various chemicals and glassware, the use of the name Paul Banks, and discovery of certain papers containing chemical notations, the respirator masks, and the two precision scales is not sufficient to sustain a finding that there was an agreement or conspiracy among the defendants to manufacture methamphetamine.

If for purposes of argument it is conceded that the extrajudicial statements of the alleged co-conspirators were admissible into evidence, the only additional evidence presented by these statements would be that Roberts talked on several occasions to the informant, Wilkinson, about producing methamphetamine and requested him to inquire as to the availability of certain chemicals which would be needed. Wilkinson's entire testimony, however, was discredited by his admissions that he was testifying against the defen-

dants to save his own neck; that the felony charges which had been placed against him were dropped in exchange for his testimony; and that he was being paid a "relocation expense" to testify against the defendants.

Thus it is submitted that Wilkinson's testimony is not entitled to any credibility in weighing the evidence.

In order to sustain the charge of conspiracy, as previously has been stated, it is necessary to prove a combination or agreement among the defendants. In the instant case there is no proof of such combination or agreement. There is some association among the defendants and similarity of actions, however, taken in its entirety, the evidence does not establish an agreement to manufacture methamphetamine. It is important to note in this regard that while Wilkinson testified that he talked to Roberts on several occasions with regard to methamphetamine, he never heard the names of Crouch or Kazakavich mentioned, nor was there ever any conversation which would indicate that anyone was working together to produce methamphetamine.

It is thus submitted that the evidence is insufficient to establish an agreement or conspiracy among Crouch and the co-defendants to manufacture methamphetamine.

3. The Trial Court erred in admitting into evidence testimony as to the ingredients and method of manufacturing the chemical compound, PCP, where the same was immaterial, irrelevant

and prejudicial to the defendant.

Rules 401 through 403 of the Federal Rules of Evidence govern the relevancy, materiality, and admissibility of evidence in a trial conducted in a United States court. Under those Rules, evidence is relevant only if it has a "· · · tendency to make the existence of any fact of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 401. "Evidence which is not relevant is inadmissible if its value is outweighed by the unfair prejudice or confusion it may create. Rule 403.

In the instant case, it is clear that the evidence offered by James H. Lawrence, (App. 264 - 268) setting forth the ingredients and procedure for manufacturing the chemical compound PCP is inadmissible, because it is irrelevant to the charges against Crouch and the co-defendants and because it raises a side issue which is prejudicial and confusing to the jury. It is impossible to properly warn the jury as to the restrictions which they must employ upon the scope of the admissibility of the evidence regarding PCP.

The witness, Lawrence, testified that certain documents were found, which contain a list of chemicals used in the manufacture of PCP. He noted that PCP was a controlled substance under federal law, but that the documents were a copy of a patent which was let to the Park Davis Company. Further, in his testimony, Lawrence referred to methamphetamine, and then returned to PCP, thus interweaving the evidence and leading to confusion as to the two (2) substances. (App. 262 - 268)

The testimony as to the ingredients and method of manufacturing PCP is clearly irrelevant to the charges against Crouch; i.e., conspiracy to manufacture methamphetamine and attempt to manufacture methamphetamine. All treatises on relevancy define it as that which "In some degree advances the inquiry, and thus has probative value." McCormick, Handbook on the Law of Evidence (2nd ed. McCleary 1972) p. 438; citing, Stauffer v. McCrory Stores Corp., 155 F. Supp. 710 (W.D. Pa. 1957). Whenever evidence is offered to prove a proposition which is not at issue, the evidence is irrelevant and inadmissible. Relevancy is decided by whether an inference is rendered more probable by the evidence than it would be without it. McCormick, supra, p.437. In this case, knowledge of the ingredients and method of manufacturing PCP was never at issue. Possession of information as to one (1) substances does not tend to prove or disprove intent to manufacture another. Nor does the mere possession of PCP documents prove a knowledge of the synthesis of either that substance or any other. For that reason, the evidence as to PCP documents was wholly irrelevant to the charge of conspiracy to manufacture methamphetamine, and should have been excluded by the trial judge, pursuant to Rule 402.

In addition to being irrelevant, the mention of PCP, a second drug substance, was a source of prejudice against Crouch and of confusion to the jury. In introducing evidence of a matter not at issue, and intermixing the discussion of PCP with the discussion of methamphetamine, there arose the danger that the jury's emotions of prejudice and hostility were aroused. Clearly Rule 403 forbids such evidence. The continuous mentioning of different drugs or chemical substances must always

tend to raise suspicions and create an atmosphere where decisions are made on an emotional basis. This prejudice, the tendency to move the jury to decide on an emotional basis, is precisely the evil that Rule 403 was designed to eliminate. It has been said that "'Each single piece of evidence must have a plus value', something more than a minimum of probative value." Frank R. Jelleff, Inc. v. Braden, 233 F.2d 671, 679 (D.C. Cir. 1956). This is expecially true where prejudice is involved. In such a case a balancing test is to be utilized by the courts, and if a prejudicial effect outweights the probative worth of evidence, it should be excluded. Here, the evidence of knowledge of PCP had only a negligible amount, if any, of probative value in proving a conspiracy. It perhaps tended to show some familiarity with chemicals, and nothing more. But the prejudicial impact of implying the defendants to be involved in several kinds of drugs was overwhelming. Under Rule 403, the evidence should have been excluded, and the court committed error in not doing so.

The evidence as to PCP was accepted by the Court with only one (1) admonition to the jury that it was accepted to show intent and knowledge of chemical synthesis. In light of Rule 105 of the Federal Rules of Evidence, such action by the Court was insufficient. Rule 105 provides that when evidence is to be used for one (1) purpose only, or against one (1) defendant only, the jury shall be instructed as to its restrictions and scope. In the case at bar, no mention was made of restricting the evidence to the one (1) defendant, Roberts, among whose possession it was found, nor was the restriction as to familiarity with any chemical synthesis.

There was only the mere possession of papers containing such information. Further, it is submitted that no limiting instructions could have outweighed the prejudice created by the introduction of evidence relating to PCP.

Because the testimony regarding PCP was irrelevant and highly prejudicial, the Court should have excluded such evidence pursuant to Rules 401-403, and the admission of such evidence was in error.

CONCLUSION

Petitioner respectfully requests that this Court grant a writ of certiorari for the above reasons.

Respectfully submitted,

JAMES WALTER CROUCH

By Stanley E. Sacks
Stanley E. Sacks,
Counsel for Petitioner

CERTIFICATE OF SERVICE

I, Stanley E. Sacks, counsel for petitioner in the captioned matter and a member of the Bar of the Supreme Court of the United States, do hereby certify that on the 26th day of October, 1977, I mailed three copies of the foregoing Petition for Writ of Certiorari to Roger T. Williams, Esquire, Senior Assistant United States Attorney, Main Post Office Building, Norfolk, Virginia, 23501, counsel of record for respondent.

Stanley E. Sacks

Stanley E. Sacks

APPENDIX

APPENDICES
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Appendix

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 77-1111

United States of America,

Appellee,

v.

James Walter Crouch,
Gary Lennis Roberts, and
Dorothy Perry Kazakavich,

Appellants.

Appeal from the United States District Court for the Eastern District of Virginia, at Newport News.
John A. MacKenzie, District Judge.

Argued July 14, 1977
Decided July 28, 1977

Before WINTER and BUTZNER, Circuit Judges; HARVEY,* District Judge

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Stanley E. Sacks (Sacks, Sacks & Tavss; F. Lee Cogdill on brief) for Appellants; Roger T. Williams, Assistant United States Attorney (William B. Cummings, United States Attorney on brief) for Appellee.

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* United States District Judge for the District of Maryland, sitting by designation.

Unpublished

PER CURIAM:

Defendants were convicted of a conspiracy to manufacture methamphetamine, a controlled substance, in violation of 21 U.S.C. § 846, and they appeal. We see no merit in this appeal and we affirm.

From our examination of the record and after consideration of the arguments, both oral and written, we are satisfied that the evidence, exclusive of the declarations of the co-conspirators, was legally sufficient to permit the jury to find a conspiracy between the defendants and that therefore the district court correctly permitted the jury to consider the declarations of one co-conspirator as evidence of the guilt of the others. The evidence that the defendants possessed documents describing the manufacture of PCP, another controlled substance, was properly admitted to show knowledge on the part of the defendants of chemical synthesis, and the district court instructed the jury to limit its consideration of that evidence solely to that fact. In instructing the jury, we think that the district court gave the instruction requested by defendants, albeit not in the precise language that they wished.

A F F I R M E D.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NEWPORT NEWS DIVISION

UNITED STATES OF AMERICA

vs. CR.# 76-28-NN

JAMES WALTER CROUCH
GARY LENNIS ROBERTS
DOROTHY PERRY KAZAKAVICH

JUNE 1976 TERM - At Norfolk, Va.

THE GRAND JURY CHARGES:

That from on or about the 1st day of October, 1975, and continuously thereafter up to and including the date of the filing of this indictment, in the Eastern District of Virginia, and elsewhere, JAMES WALTER CROUCH, GARY LENNIS ROBERTS and DOROTHY PERRY KAZAKAVICH, the defendants herein, willfully and knowingly did combine, conspire, confederate and agree together, with each other and with divers other persons whose names are to the grand jurors unknown, to manufacture methamphetamine, a Schedule II controlled substance, in violation of § 21, Title 846, USCA.

1. It was a part of said conspiracy that the defendants and co-conspirator JAMES WALTER CROUCH

would order and receive precursor chemicals, glassware and laboratory apparatus to be used in the manufacture of methamphetamine.

2. It was further a part of said conspiracy that the defendant and co-conspirator DOROTHY PERRY KAZAKAVICH would order and receive precursor chemicals to be used in the manufacture of methamphetamine.

3. It was further a part of said conspiracy that the defendant and co-conspirator GARY LENNIS ROBERTS would receive precursor chemicals to be used in the manufacture of methamphetamine.

4. It was further a part of said conspiracy that the defendant and co-conspirator GARY LENNIS ROBERTS would advise others who are not defendants or co-conspirators that he was going to manufacture methamphetamine and he (ROBERTS) did take orders for quantities of methamphetamine.

COUNT TWO

THE GRAND JURY FURTHER CHARGES:

That on or about the 31st day of January, 1976, in the Eastern District of Virginia, JAMES WALTER CROUCH, GARY LENNIS ROBERTS and DOROTHY PERRY KAZAKAVICH knowingly and intentionally did attempt to manufacture methamphetamine, a Schedule II controlled substance. (21 USCA § 846 and 21 USCA § 841(a)(1))

A TRUE BILL:

_____
F O R E M A N

WILLIAM B. CUMMINGS
UNITED STATES ATTORNEY

BY _____
Roger T. Williams
Assistant United States Attorney

UNITED STATES DISTRICT COURT
FOR THE
EASTERN DISTRICT OF VIRGINIA
NEWPORT NEWS DIVISION

THE UNITED STATES

v. CR. No. 76-28-NN

JAMES WALTER CROUCH

We, the Jury, find the defendant JAMES WALTER CROUCH guilty as charged in Count 1 of the Indictment.

8/20/1976 _____
(Date) (Foreman)